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No. 134

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIAM C. GREENE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Appeals (R. 131–139) is reported at 246 F. 2d 677.

JURISDICTION

The judgment of the Court of Appeals was entered on May 16, 1957 (R. 140). On June 10, 1957, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including July 5, 1957 (R. 141) and the petition was filed on that date. The petition was granted on June 30, 1958 (R. 141–142). 357 U. S. 934. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether one sale of narcotics may constitute three separately punishable offenses under the Narcotic Drug Import and Export Act, the Internal Revenue Code's stamped package requirement, and the Internal Revenue Code's requirement of a written order form.

2. Whether a court of appeals, upon finding valid sufficient counts to support the sentence imposed, may affirm the conviction without passing on all counts.

STATUTES INVOLVED

18 U. S. C. 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The Narcotic Drugs Import and Export Act, Sec. 2 (c), 65 Stat. 767 (21 U. S. C. 174), as it read at the time the crimes charged were alleged to have been committed,[1] provided in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates

[1] The punishment section was amended by the Narcotic Control Act of 1956, 70 Stat. 567, 570.

the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. * * *

Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

The Internal Revenue Code of 1954, Sections 4704 (a), 4705 (a), and 7237 (a), 68A Stat. 550–551, 860, as amended, 69 Stat. 3 (26 U. S. C., Supp. III, 4704 (a), 4705 (a), 7237 (a)), read in part as follows:

SEC. 4704. *Packages.*

(a) *General Requirement.*

It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

SEC. 4705. *Order Forms.*

(a) *General Requirement.*

It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the

person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

SEC. 7237. *Violation of Laws Relating to Narcotic Drugs and to Marihuana.*

(a) *Violation of Law Relating to Opium and Coca Leaves and Marihuana.*

Whoever commits an offense or conspires to commit an offense described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided [such as sections 4704 (a) and 4705 (a), *supra*], shall be fined not more than $2,000 and imprisoned not less than 2 or more than 5 years. * * *[2]

STATEMENT

Petitioner was convicted in the United States District Court for the District of Columbia on fifteen counts charging various narcotic offenses (R. 123). The date and substance of each violation are set out in the following table (R. 1–9):

[2] The term of imprisonment was amended by the Narcotic Control Act of 1956, 70 Stat. 567.

Count	Date	Violation
1	Dec. 11, 1954 to Feb. 2, 1955	Conspired to violate 26 U. S. C. 4704 (a) and 4705 (a) and 21 U. S. C. 174
2	Jan. 14, 1955	Concealed and sold imported heroin—21 U. S. C. 174
3	Jan. 18, 1955	Concealed and sold imported heroin—21 U. S. C. 174
4	Jan. 21, 1955	Sold or gave away narcotics not in pursuance of proper order—26 U. S. C. 4705
5	Jan. 21, 1955	Distributed narcotics not in original stamped package—26 U. S. C. 4704
6	Jan. 21, 1955	Concealed and sold imported heroin—21 U. S. C. 174
7	Jan. 23, 1955	Sold or gave away narcotics not in pursuance of proper order—26 U. S. C. 4705
8	Jan. 23, 1955	Distributed narcotics not in original stamped package—26 U. S. C. 4704
9	Jan. 23, 1955	Concealed and sold imported heroin—21 U. S. C. 174
10	Jan. 29, 1955	Sold or gave away narcotics not in pursuance of proper order—26 U. S. C. 4705
11	Jan. 29, 1955	Distributed narcotics not in original stamped package—26 U. S. C. 4704
12	Jan. 29, 1955	Concealed and sold imported heroin—21 U. S. C. 174
13	Jan. 30, 1955	Sold or gave away narcotics not in pursuance of proper order—26 U. S. C. 4705
14	Jan. 30, 1955	Distributed narcotics not in original stamped package—26 U. S. C. 4704
15	Jan. 30, 1955	Concealed and sold imported heroin—21 U. S. C. 174

The evidence for the Government, in pertinent part, may be summarized as follows:

Federal agent Fialkewicz, under an assumed name, arranged with a Miss Barbara Floyd (also indicted) to purchase narcotics (R. 20–22, 65). The pattern followed in all of the sales was for Miss Floyd to meet Fialkewicz and other agents at a pre-arranged rendezvous for the purpose of selling them heroin. According to Miss Floyd, she obtained the heroin for all the sales from petitioner to whom she delivered the money given her by the agents (R. 40, 45). She testified that she had accompanied petitioner to New

York on two occasions when he purchased narcotics (R. 40, 51), and that she received no money from petitioner for delivering the heroin but did it because she thought the agent was addicted to narcotics and "felt sorry" for him (R. 44). She further stated that she had used heroin only once before she met petitioner; that although not an addict she used heroin during the time she delivered for petitioner; and used it three or four times after her arrest when she obtained it from petitioner (R. 34–36, 51–52).

On January 21, 1955, agent Fialkewicz met Miss Floyd, drove her to the vicinity of petitioner's home, and gave her $100 for heroin which she promised to deliver later (R. 24, 69). Later that evening, she was driven by petitioner to her meeting with the agents (R. 25–26, 70–73, 94–95). At this meeting, she turned over fewer capsules than had been ordered (Counts 4–6) and agreed to deliver the remainder later (R. 26–27, 71). There were no stamps on the package and the agents did not give Miss Floyd an order form (R. 94). While she was talking with the agents, petitioner passed by and later drove her home (R. 27, 94–95). On January 23, 1955, she delivered the remainder of the heroin to the agents, again without stamps and order form (R. 28, 75–76, 78) (Counts 7–9). Miss Floyd had given the money to petitioner (R. 24) and had obtained the heroin from him (R. 25, 28).

On January 29, Fialkewicz telephoned Miss Floyd at petitioner's home and arranged for another sale (R. 29–30, 78–80). Miss Floyd met the agents that evening, again accompanied by petitioner, received

$80, and delivered less than the agreed amount of heroin (R. 30–31, 80–81) (Counts 10–12). There were no stamps and no order form (R. 82). Later that evening, Fialkewicz called Miss Floyd at petitioner's home, and arranged for her to deliver the remainder of the heroin. She did so in the early morning of January 30, again being driven to the rendezvous in petitioner's car (R. 31–32, 83–84) (Counts 13–15). As in the earlier transaction, petitioner was the source of the narcotic and the recipient of the money (R. 30–32).

On February 2, 1955, agent Fialkewicz, seeking to arrange another purchase from Miss Floyd, spoke directly to petitioner on the telephone (R. 86–88). When Fialkewicz mentioned his dealings with Miss Floyd, petitioner said that "[s]he delivered for me" (R. 88). Fialkewicz then met petitioner personally, and arranged to purchase heroin directly from him (R. 88).[3] This sale fell through, however, because, although petitioner drove to the place appointed for the sale and stopped, he left without meeting the agent (R. 89).

In December 1954, prior to the dealings with Miss Floyd, agents Kelly and Jackson had met her with petitioner on occasions when they unsuccessfully sought to obtain heroin directly from him (R. 53–59, 63). At that time petitioner told Kelly that he would not directly deal in narcotics, but would deal through someone (R. 56).

[3] At the time of the delivery on January 29, Fialkewicz overheard Floyd angrily tell petitioner, "You are putting me out in front and I am doing your work for you" (R. 81).

In sentencing the defendant, the District Court imposed a term of twenty months to five years and a $500 fine on each count,[4] directing that on counts 2, 4, and 7 the sentences were to run consecutively, "the sentences on the other counts to run concurrently with the sentences on counts 2, 4, and 7." The court went on: "In other words, the aggregate sentence is not less than five years and not more than 15 years, and a $1,500 fine." (R. 125–126).

In the Court of Appeals, the petitioner asserted a number of errors but in particular attacked the multiplicity of counts, contending that in many instances he had been convicted twice for the same alleged offense. In affirming the judgment, the majority of the Court of Appeals stated (R. 131):

> The record supports at least 5 of the sentences that were to run "concurrently with" the 3 consecutive sentences. It therefore supports the aggregate sentence. We need not decide whether it supports the "consecutive" sentences themselves.

Judge Bazelon, dissenting, thought only the convictions on counts 4, 5, 6, 10, 11, and 12 were valid. He concluded that the "Kelly-Jackson testimony" was inadmissible and that its consideration might have influenced the jury verdict as to counts 1–3. Counts 7–9, and 13–15, he considered invalid on the theory that two different deliveries of separate quantities of narcotics on different days did not constitute two trans-

[4] Sentence was imposed under District of Columbia Code 24-203, which provides for indeterminate sentences. This local law is no longer applicable to narcotic offenders. 26 USC (Supp. V) 7237 (d).

actions if made pursuant to one initial bargain (R. 132–139).

SUMMARY OF ARGUMENT

The Court of Appeals affirmed the conviction with the statement that the "record supports at least 5 of the sentences that were to run 'concurrently with' the 3 consecutive sentences." We therefore assume, as does petitioner, that petitioner's conviction was upheld on the basis of the counts considered valid by the dissenting judge. These are counts 4 (one of the three consecutive-sentence counts), 5, and 6, relating to the 21st of January, and counts 10, 11, and 12, relating to January 29, 1955. On that assumption, petitioner's theory that the six counts really amount to only two offenses—supporting a sentence of ten, rather than fifteen, years—raises the question of the applicability of *Gore* v. *United States,* 357 U. S. 386. On the other hand, petitioner was convicted on fifteen counts, no one of which has been held invalid by the Court of Appeals. If petitioner is correct that these six counts support only two offenses, it would be necessary to consider the validity of the other counts to determine whether they support the additional sentence. This issue has not been passed upon by the Court of Appeals and should be remanded to that court if necessary. We confine our discussion to the issues raised by petitioner.

I

In *Gore* v. *United States,* 357 U. S. 386, this Court upheld three separate sentences for three offenses growing out of one act of sale. Those offenses—concealment of unlawfully imported drugs, sale not in

pursuance of a written order, and sale not in or from the original stamped package—are the same offenses involved here.

The *Gore* decision is bottomed on the assumption that the three offenses arose out of one act of sale. We thus do not believe there is any merit in petitioner's contention that here the same evidence was used to prove three offenses, as a basis for distinguishing *Gore* or for suggesting that *Gore* be reconsidered. Petitioner expressly states (Pet. Br. 34) that the test is not what evidence the statutes permit, but what they actually require for conviction. On that basis, 21 U. S. C. 174 *requires* proof of transportation, concealment, or sale, and illegal importation. 26 U. S. C. 4704 *requires* proof of purchase, sale, or distribution not in or from the original stamped package. The statutes *do not require* proof of possession. One of the ways by which the elements of the crimes may be proven is by an inference which the statutes provide shall be drawn from the unexplained possession of narcotics without stamps. As to 26 U. S. C. 4705, there is no statutory presumption from possession alone; the absence of a written order form and a sale or distribution must be shown by direct evidence. Thus each statute requires proof of an element not found in the others, even though all of the elements of three offenses may be present in one sale transaction. While we do not think it important, we note that violations of the separate requirements were explicitly shown in this case. As to each transaction, the agents testified that there was a sale and that there were no stamps and no order form was used. The separate elements dis-

tinguishing the three statutes were, except for importation, affirmatively proved.

The fact that petitioner acted through Miss Floyd, an accomplice, does not mean that he committed only one offense as to each sale. Petitioner aided and abetted Miss Floyd in the consummation of each sale, and when she committed three offenses in the course of each transaction so did he. As her aider and abetter, her acts were his.

II

In affirming the conviction and sentence, the Court of Appeals considered the five-to-fifteen year sentence imposed in this case as a general sentence on all the counts of which petitioner was convicted, and petitioner does not challenge the treatment of the sentence as a general one. Since the convictions on six counts arising out of two sales were found to be valid, and since those six counts would support a sentence of up to thirty years, the majority of the court below found it unnecessary to consider the validity of any of the other counts. Petitioner now urges this Court to overturn the rule that, in upholding a general sentence, a reviewing court need only find sufficient valid counts to support that sentence.

Ever since *Claassen* v. *United States*, 142 U. S. 140, 146–147, it has been a well-established and constantly reaffirmed rule that a general or concurrent sentence imposed on several counts should not be reversed for error in one or more counts if there are sufficient valid counts to support the sentence. As late as *Pinkerton* v. *United States*, 328 U. S. 640, 641–642, fn. 1, the

Claassen language was quoted with approval as setting forth settled law.

The doctrine to be found in *Claassen* is not just an historical accident. It rests on the premise that our courts do not render advisory opinions and do not render judgments which will not afford relief to a party. It recognizes that in imposing a sentence the district court considers not only the offense, but even more the offender. And so, whenever it is reasonably apparent that reversal of particular counts will not, in view of the remaining counts, have any tendency to affect a change of sentence, the *Claassen* rule permits an appellate court to decline to consider additional counts once it has found sufficient valid counts to support the sentence.

In a sense, the *Claassen* rule, which leads to affirmance here, is similar to the principle of mootness. A case may become moot for many reasons, but however the question may arise, when the court is presented with a judgment which no longer affects legal rights it declines to answer the questions presented by the record, not because error did not occur, but because there is no longer a controversy between the parties. A decision would be of no benefit to the petitioner even if he shows that the judgment was faulty in some way. So it is in a case like this, where there are sufficient proper findings of guilt to support the sentence. There is no occasion for further review if there is no probability that further consideration will affect the sentence.

The *Claassen* rule as applied by the Court gives needed flexibility to the law. It permits the appellate

court to terminate review and affirm when it finds sufficient valid counts to support the sentence and there is no probability that the other counts, even if defective, contributed to the sentence. On the other hand, whenever a court of appeals finds a substantial number of bad counts, or believes that the district judge may wish to reduce the sentence in the light of its views, it may so indicate. Whether the appellate tribunal does so or not, the district court may reduce the sentence, on its own volition or at defendant's request. There is thus no need for the rigid rule urged by petitioner.

In this case it is not likely that the sentence would have been less if the nine counts which we have not considered here had been ignored by the trial judge. Although the sentencing judge noted there were fifteen counts before him, he placed much more emphasis upon the large quantities of narcotics involved in the admittedly valid counts. The sentence actually imposed, five to fifteen years, was well within the maximum sentence of thirty years which might have been imposed for the six counts considered here, and itself suggests that the trial court would not have imposed a lesser term if only six counts had been before him.

ARGUMENT

Since the Court of Appeals affirmed the conviction with the statement that the "record supports at least 5 of the sentences that were to run 'concurrently with' the 3 consecutive sentences", we assume, as does petitioner, that petitioner's conviction was upheld on

the basis of the counts accepted as valid by the dissenting judge. These are counts 4 (one of the three consecutive-sentence counts), 5, and 6, relating to the 21st of January, and counts 10, 11, and 12, relating to January 29, 1955. On that assumption, this case raises the question of the applicability of *Gore* v. *United States*, 357 U. S. 386, since on petitioner's theory only ten years of the five-to-fifteen year sentence could be sustained by the six counts. On the other hand, petitioner was convicted on fifteen counts, no one of which has been held invalid by the Court of Appeals. If the six counts considered by the Court of Appeals should be held to cover only two offenses, it would be necessary to consider the validity of the conviction on the other counts to determine whether they support the additional sentence. However, since the issues raised by the challenge to these counts were not passed upon by the Court of Appeals, we think that, if necessary, those issues should properly be remanded to the court below for its consideration. We confine our discussion to the issues raised by petitioner.

I

EACH SALE BY PETITIONER THROUGH HIS INTERMEDIARY RESULTED IN THREE OFFENSES IN VIOLATION OF THREE DIFFERENT STATUTORY REQUIREMENTS

A. THE RULING IN *Gore* v. *United States*, 357 U. S. 386, APPLIES HERE

Gore v. *United States*, 357 U. S. 386, is squarely in point and dispositive. In *Gore*, the petitioner was convicted of six counts for narcotic offenses growing

out of two sale transactions. There, as here (so far as counts 4–6 and 10–12 are concerned) Gore was charged, as to each transaction, with concealment of unlawfully imported drugs, sale not in pursuance of a written order, and sale not in or from the original stamped package. Consecutive sentences were imposed as to the first three counts, and the legality of those sentences was the core of the controversy.

This Court reasoned that "[t]he fact that an offender violates by a single transaction several regulatory controls devised by Congress as means for dealing with a social evil as deleterious as it is difficult to combat does not make the several different regulatory controls single and identic" (357 U. S. at 389). To the contrary, "[t]he three penal laws for which petitioner was convicted have different origins both in time and design" (357 U. S. at 390), evidencing a Congressional intent that if a defendant violates all three statutes by one narcotics transaction he should not be treated as though he committed only one of these offenses (357 U. S. at 391). The Court ruled that it was not constitutionally beyond the power of Congress (as an encroachment upon the prohibition against double jeopardy) to impose separate punishment for the separable violations of separate requirements involved in the one act of sale.

Gore cannot be distinguished from the instant case on the ground that it arose on a motion to vacate sentence under 28 U. S. C. 2255, whereas this case comes to the Court on direct appeal after a conviction. In *Blockburger* v. *United States*, 284 U. S. 299,

the offender was charged, convicted, and cumulatively sentenced for selling narcotics not in the original stamped package and not in pursuance of a written order. Both offenses arose out of one sale. That case came to this Court, as does this case, on direct appeal and it was held that the offenses were separate, and severally punishable. The decision in *Gore* expressly rested, in part, upon the authority of the earlier case—this Court saying (357 U. S. at 388), "We adhere to the decision in *Blockburger* v. *United States, supra.*" The *Gore* decision was based on the expressed intent of Congress in enacting the three statutes in question, not upon any difference arising from the narrower scope of review on collateral attack as distinguished from direct review.

Also, as is pointed out more fully in the government's brief in the *Harris* case, No. 11, this Term, *Gore* is indisputably bottomed on the assumption that the three offenses arose out of one act of sale. In discussing the constitutionality of providing separate punishment for the various violations of different statutes in the one act of sale, the majority opinion noted, 357 U. S. at 392:

> Suppose Congress, instead of enacting the three provisions before us, had passed an enactment substantially in this form: "Anyone who sells drugs except from the original stamped package and who sells such drugs not in pursuance of a written order of the person to whom the drug is sold, and who does so by way of facilitating the concealment and sale of drugs knowing the same to have been unlaw-

> fully imported, shall be sentenced to not less than fifteen years' imprisonment: *Provided, however,* That if he makes such sale in pursuance of a written order of the person to whom the drug is sold he shall be sentenced to only ten years' imprisonment: *Provided further,* That if he sells such drugs in the original stamped package he shall also be sentenced to only ten years' imprisonment: *And provided further,* That if he sells such drugs in pursuance of a written order and from a stamped package, he shall be sentenced to only five years' imprisonment." Is it conceivable that such a statute would not be within the power of Congress? * * *

We thus do not believe there is any merit at all in petitioner's argument that here the same evidence was used to prove three separate offenses, as a basis either for distinguishing *Gore* or for suggesting that this Court reconsider that decision. As petitioner himself states (Pet. Br. 34), the test "is not what evidence the statutes permit, but what they actually *require* for conviction." None of the statutes *requires* proof of possession. 21 U. S. C. 174 *requires* proof of transportation, concealment, or sale, and proof of illegal importation. This may be proven by direct evidence. Another means by which the elements of the crime may be proven is by an inference derived from the unexplained possession of narcotics. 26 U. S. C. 4704 *requires* proof of purchase, sale, or distribution not in or from the original stamped package. Again, this proof may be supplied by direct

evidence. Alternatively, or to buttress the direct evidence, resort may be had to an inference which the statute provides shall be drawn from the unexplained possession of narcotics without stamps. And, as petitioner acknowledges (Br. 19), as to 26 U. S. C. 4705, there is no statutory presumption from possession alone; the absence of a written order form and a sale or distribution must be shown by direct evidence.[5] Thus each statute does, as this Court held in *Blockburger* v. *United States,* 284 U. S. 299, require proof of an element not found in the other. It can happen that proof of one sale without a written order, from an unstamped package, would show a violation of all three statutes; it is still true that violations of three different statutes, having three different requirements, are shown by that proof.

Indeed, in this case, violations of the separate requirements were explicitly shown. As to each transaction, the agents testified to the sale, leaving only the necessity of presuming that the sellers knew that the narcotics were illegally imported. And as to each transaction, the agents testified specifically that there were no stamps and no order form was used. Thus, while we do not think it important, the fact is that the separate elements that distinguished the three statutes

[5] The judge did not charge as to any presumption of possession on the counts under 26 U. S. C. 4705 (R. 116). Manifestly, therefore, the conviction on the counts under that statute (counts 1 [conspiracy to violate §§ 4704 (a) and 4705], 4, 7, 10, and 13) cannot be attributed to the proof of possession. Rather, they rest on proof that petitioner aided Miss Floyd to make the sale without an order form.

were, except for importation, affirmatively proved in this case.[8]

B. THE FACT THAT PETITIONER ACTED THROUGH AN ACCOMPLICE DOES NOT MEAN THAT HE IS CHARGEABLE WITH ONLY ONE OFFENSE AS TO EACH SALE

Petitioner argues that, even if the three separate violations by Miss Floyd were shown, the proof as to him becomes single because the jury was allowed to convict him as an aider and abettor. The government did proceed on the theory that petitioner was the source of the narcotics sold by Miss Floyd to the federal agents, that he was the recipient of the money, and was Miss Floyd's aider and abettor in the consummation of the sales. The trial judge gave full instructions on this theory (R. 119–120)—instructions which are not questioned on the grounds of accuracy or completeness here. Petitioner's use of an intermediary in effecting the sales of narcotics does not transform three offenses into one.

18 U. S. C. 2, *supra*, p. 2, provides that anyone who "aids, abets, counsels, commands, induces or procures" the commission of an offense, or "willfully causes an act to be done which if directly performed by him or another would be an offense," is punishable as a principal. In this case it was necessary that petitioner " 'in some sort associate himself with the

[8] As to the two offenses which make possession (21 U. S. C. 174) and absence of stamps in the hands of the possessor (26 U. S. C. 4704) presumptive evidence of the respective violations, the judge did, as the statutes require, permit the jury to find guilt from the finding of possession of unstamped narcotics.

venture, that he participates in it as in something that he wishes to bring about, that he seek by his action to make it succeed'." *Nye & Nissen* v. *United States*, 336 U. S. 613, 619, quoting from *United States* v. *Peoni*, 100 F. 2d 401, 402 (C. A. 2).

The venture in which petitioner associated himself was to sell illegally imported narcotics without an order form and without stamps. The jury certainly had the right to infer that petitioner, when he supplied Miss Floyd with narcotics, knew that the narcotics did not come from a stamped package and knew that she was selling without an order form. Petitioner, as an aider and abettor, stands in Miss Floyd's shoes. When she sold illegally imported drugs, that act was petitioner's. When she sold heroin which was not in the original stamped package, then petitioner so sold. And when she sold narcotic drugs other than pursuant to a written order form, petitioner was chargeable with her offense. If, in the course of two sales, Miss Floyd committed six offenses, then petitioner was equally guilty. One who enlists the services of an agent, so that he can conceal his identity or increase the scope of his illegal activities, does not thereby consolidate his liability into a single offense when that agent, at his direction, commits several offenses.

II

A COURT OF APPEALS, UPON FINDING VALID SUFFICIENT COUNTS TO SUPPORT THE SENTENCE IMPOSED, MAY AFFIRM THE CONVICTION WITHOUT PASSING ON ALL COUNTS.

In affirming the conviction and sentence, the Court of Appeals considered the fifteen-year sentence im-

posed in this case as a general sentence on all the counts of which petitioner was convicted.[7] Since the convictions on six counts arising out of two sales were found to be valid, and since those six counts would support a sentence up to thirty years, the majority of the court below found it unnecessary to consider the validity of any of the other counts.

Petitioner agrees that the sentence imposed was a general one and the record supports this construction of the sentence.[8] Both orally from the bench and in the formal order, the district judge indicated that he was imposing consecutive sentences on counts 2, 4, and 7, and that the sentences on the other counts were to

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[7] Ever since *In re De Bara*, 179 U. S. 316, 322, and *In re Henry*, 123 U. S. 372, it has been established that the trial court has the power to give a single sentence for several offenses in excess of that which is lawful for one offense, so long as the cumulative maximum punishment is not exceeded. *Phillips* v. *United States*, 212 F. 2d 327, 335 (C. A. 8); *Barnes* v. *United States*, 197 F. 2d 271, 273 (C. A. 8); *Levine* v. *Hudspeth*, 127 F. 2d 982, 984 (C. A. 10), certiorari denied, 317 U. S. 628; *McKee* v. *Johnston*, 109 F. 2d 273, 275 (C. A. 9), certiorari denied, 309 U. S. 664; *Jackson* v. *Hudspeth*, 111 F. 2d 128, 129 (C. A. 10); *Ross* v. *Hudspeth*, 108 F. 2d 628, 629 (C. A. 10); *Hawkins* v. *United States*, 14 F. 2d 596, 597–598 (C. A. 7); *Klein* v. *United States*, 14 F. 2d 35, 37 (C. A. 1); *Neely*, et al. v. *United States*, 2 F. 2d 849, 852 (C. A. 4); *Feigin* v. *United States*, 3 F. 2d 866 (C. A. 9).

[8] If the sentence could not be considered as a gross sentence, at least as to the 12 counts which were to be concurrent with 2, 4, and 7, we believe that the case would have to be remanded to the Court of Appeals to pass on the validity of counts 2, 4, and 7. If it found any one of them invalid, that court would then have to remand to the District Court for resentencing, since, assuming that the other counts cannot be considered in gross, it is not clear which of them, taken individually, were to be concurrent with 2, which with 4, and which with 7.

run concurrently with the sentences on those counts (R. 124–126). The district judge did not indicate which of the twelve remaining counts were to run concurrently with particular "consecutive" counts. On the contrary, his language indicates that as a group the twelve counts were to be concurrent with "2, 4 and 7." The language of the formal order ("said sentences by the Counts to run concurrently and to run concurrently with the sentences imposed on Counts Two, Four and Seven") also indicates a collective lumping of the twelve remaining counts in support of the aggregate sentence imposed on the three counts.

That the construction of the sentence as a general one is correct also seems clear from the district judge's final statement from the bench (R. 126):

> In other words, the aggregate sentence is not less than five years and not more than 15 years, and a $1,500.00 fine.

The majority of the court below quoted this language and noted that the judge had imposed an "aggregate sentence" (R. 131). The dissenting judge agreed that there had been an aggregate sentence, but stated that he did "not assume that the District Court would have imposed the same aggregate sentence for a conviction of six counts as for a conviction of 15 counts" (R. 139). In the light of the view of the Court of Appeals, interpreting a sentence imposed under local procedures, we think the status of the sentence as a general one is settled.

Although agreeing that the sentence here was a general one, petitioner urges this Court to reconsider

the rule, which he admits is well-established, that in upholding such a sentence a reviewing court need find only sufficient valid counts to support that sentence. He argues that a district court would usually consider the number of crimes of which a defendant was convicted and, unless the convictions on all the crimes are reviewed, there is no certainty that this premise on the part of the trial judge is a correct one.

The principle which petitioner is here attacking was first stated by this Court more than sixty-five years ago, in *Claassen* v. *United States,* 142 U. S. 140, 146–147, where it was said:

> And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only.

The rule has been constantly reaffirmed. *Emspak* v. *United States,* 349 U. S. 190, 195, fn. 9; *Pinkerton* v. *United States,* 328 U. S. 640, 641–642, fn. 1; *Whitfield* v. *Ohio,* 297 U. S. 431, 438; *Sinclair* v. *United States,* 279 U. S. 263, 299; *Abrams* v. *United States,* 250 U. S. 616, 619; *Evans* v. *United States,* 153 U. S. 584, 595. In 1946, the Court quoted the *Claassen* language with approval and said that "It is settled law". *Pinkerton* v. *United States, supra,* 328 U. S. at 642, fn. 1.

The same rule is applied where there are concurrent sentences adjudged on separate counts, at least one of which is good. *Lawn* v. *United States*, 355 U. S. 339, 359; *Roviaro* v. *United States*, 353 U. S. 53, 59, fn. 6; *United States* v. *Sheridan*, 329 U. S. 379, 381; *Hirabayashi* v. *United States*, 320 U. S. 81, 85; *United States* v. *Johnson*, 319 U. S. 503, 518; *Gorin* v. *United States*, 312 U. S. 19, 33; *United States* v. *Trenton Potteries*, 273 U. S. 392, 402; *Brooks* v. *United States*, 267 U. S. 432, 441; *Pierce* v. *United States*, 252 U. S. 239, 252–253; *Debs* v. *United States*, 249 U. S. 211, 216.

The continuing validity of this doctrine over so long a period of years must be attributed to something more than an historical accident. See *Hawkins* v. *United States*, No. 20, this term, decided November 24, 1958; *Weiler* v. *United States*, 323 U. S. 606, 609–610. And the fact is that the rule which petitioner asks this Court to overturn is supported by valid considerations other than simple precedent or the presumption expressed in *Claassen*.[9] The rule rests on the sound

[9] Petitioner suggests that the Court in the *Claassen* case was led into error by reliance upon the English cases of *Peake* v. *Oldham*, Cowp. 275, 276, 98 Eng. Rep. 1083, 1084; *Rex* v. *Benfield*, 2 Burr. 980, 985, 97 Eng. Rep. 664, 667; and *Grant* v. *Astle*, 2 Doug. 722, 730, 99 Eng. Rep. 459, 466. He contends that the English rule is that one good count is not enough to sustain the verdict and sentence if other counts are bad, and cites *O'Connell* v. *Regina*, 11 Clark & Fin. 155, 366–373, 8 Eng. Rep. 1061, 1141–1143. The short answer is that the Court in *Claassen* expressly considered, and rejected, the *O'Connell* case. *O'Connell* was decided in the House of Lords by the votes of Lord Denman, Lord Cottenham and Lord Campbell against the votes of the Lord Chancellor and Lord Brougham. 8 Eng. Rep. at 1119, 1161. The opinion of the majority was contrary

premise that our courts do not render advisory opinions and do not render judgments which will not afford relief to a party. It recognizes that district judges in imposing sentence consider not only the offense, but even more the offender. And so, whenever it is reasonably apparent that reversal of particular counts will not, in view of the remaining

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to the opinion of the majority of the judges who were asked to give their advice. Judges Tindal (8 Eng. Rep. at 1091, 1093), Patteson (8 Eng. Rep. at 1100–1103), Maule (8 Eng. Rep. 1104), Williams (8 Eng. Rep. at 1107–1109), Gurney (8 Eng. Rep. at 1110), Alderson (8 Eng. Rep. at 1111–1113), and Coleridge (8 Eng. Rep. at 1119) would have affirmed the verdict and judgment below. Coltman (8 Eng. Rep. at 1105–1106) and Parke (8 Eng. Rep. at 1114–1116) would have reversed. As to the majority in the House of Lords who voted to reverse, only Denman (8 Eng. Rep. at 1141) and Campbell (8 Eng. Rep. at 1158–1159) did not accept the proposition that judgment and sentence is presumed to be entered on the good counts and not the bad when nothing else appears. Lord Cottenham expressly put his decision on the ground that the facts of the *O'Connell* case showed that judgment and sentence were given on the bad as well as the good counts (8 Eng. Rep. at 1151). This, of course, is the ground expressly saved in *Claassen*, 142 U. S. at 146–147.

Moreover, Great Britain changed the rule of the *O'Connell* case by statute. See Stat. 11 & 12 Vict. c. 78, s. 5, and *Holloway* v. *The Queen*, 17 QB 317, 322; 117 Eng. Rep. 1300, 1303, fn. (a)1. At the present time, the applicable law in Great Britain is 7 Edw. VII c. 23, s. 5 (1), 14 The Statutes Revised (3d ed.) p. 185, which provides:

"If it appears to the Court of Criminal Appeal that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the court may either affirm the sentence passed on the appellant at the trial, or pass such sentence in substitution therefor as they think proper, and as may be warranted in law by the verdict on the count or part of the indictment on which the court consider that the appellant has been properly convicted."

counts, have any tendency to affect a change of sentence, it would violate the rule of judicial parsimony to require an appellate court to consider additional counts once it has found sufficient valid counts to support the sentence. The courts should not be required to resolve issues which would not result in relief to the complaining party. Clearly if, after conviction for a number of counts, the judge has imposed a sentence of the minimum for only one count, there would be no purpose in reviewing more than one count. Similarly, even where the general sentence is beyond that permissible on more than one count, there is usually no purpose to be gained, no available relief to the defendant, in reviewing more counts than are necessary to support the sentence.

An analogy can be drawn between the rule leading to affirmance here and cases involving mootness. Cases may become moot for many reasons. Petitioner may have served his sentence before certiorari was granted, and the conviction may have no other future consequences. *St. Pierre* v. *United States*, 319 U. S. 41; cf. *Fiswick* v. *United States*, 329 U. S. 211, 220–223). The law may have been changed pending the appeal. *United States* v. *Alaska Steamship Company*, 253 U. S. 113, 115–116. The declaration of war may have compelled the termination or suspension of illegal activities. *United States* v. *Hamburg-American Company*, 239 U. S. 466, 475–476. In a habeas corpus case, the custody or restraint may have been terminated without use of the writ. *Eagles* v. *Samuels*, 329 U. S. 304, 307. However the question may arise, when the Court is presented with a judg-

ment which no longer affects legal rights, it declines to answer the questions which the record may present, not because error did not occur, but because there is no longer a controversy between the parties. A decision may not result in any benefit to the petitioner even if he shows that the judgment was faulty in some way. So it is in a case like this, where there are sufficient proper findings of guilt to support the sentence. There is no occasion for further review if there is no probability that further consideration will affect the sentence.

Indeed, the rule often results in benefit to a defendant. If a court, after finding enough good counts to support a verdict, would go on and review other counts and then reverse, a defendant might be subject to retrial on those additional counts, even if the sentencing judge reaffirmed the sentence on the counts which were sustained. This probably would not often occur, but it would be possible. See *Putnam* v. *United States*, 162 U. S. 687, where petitioner was convicted on two counts and received concurrent sentences of equal length on each count (162 U. S. at 688, 689). On appeal, cause for reversal was found as to one count. This Court noted (162 U. S. 714):

> * * * it is doubtful whether the error committed, as to the second counts, should be treated as prejudicial, since the only effect of reversing and ordering a new trial, as to this count, will be to leave the full term of the existing sentence in force and to submit the accused to another trial on the second count, *from which, if convicted, an additional sentence may result.* [Emphasis added.]

Because the rule is essentially based on the realistic consideration of whether further review will accomplish any result, the exceptions to which petitioner points merely reinforce the rule. Where it does seem likely that review of all aspects of the case is necessary to support a sentence, the appellate courts have reviewed the whole case, even where one phase would support a general sentence. In *Yates* v. *United States,* 355 U. S. 66, for example, petitioner had been convicted of eleven criminal contempts and only one was sustained. Moreover, the case was one of contempt, where traditionally the appellate courts have had more power over the penalty. The same reasoning applies to *Nilva* v. *United States,* 352 U. S. 385, where only one of three counts for criminal contempt was sustained. And see *United States* v. *Hines,* 256 F. 2d 561, 563 (C. A. 2).[10]

In other words, whenever a court of appeals finds a substantial number of bad counts, or believes that

[10] The other decisions of this Court referred to in *Hines* involved different considerations. In *Yasui* v. *United States,* 320 U. S. 115, 117, the district court, which imposed the maximum penalty, had held that petitioner, a Japanese-American, had renounced his American citizenship and therefore was subject to World War II curfew regulations as an alien. On appeal, it was held that, although curfew regulations were applicable to American citizens of Japanese descent, petitioner had not renounced his American citizenship. The case was remanded for resentencing in the light of that fact. In *Husty* v. *United States,* 282 U. S. 694, 703, the Court of Appeals had sustained general sentences on the theory that they were supported by the second of two counts alone. This Court did not question the general principle in *Claassen,* but remanded for resentencing because the second count would not support the sentences imposed and because of confusion in the court below as to the permissible maximum sentence.

the district judge might wish to reduce the sentence in the light of its views, it may so indicate; or the appellate court may, if it wishes, consider and pass upon all the counts. The matter is within the sound discretion of the Court of Appeals. And whatever the appellate court does, the district court may always reduce the sentence in the light of the Court of Appeal's action. In every case, a defendant may request the district court to reduce his sentence after appellate review is completed. Rule 35 of the Federal Rules of Criminal Procedure provides:

> The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

There is thus no need for the rigid rule suggested by petitioner that the Court of Appeals *must* consider each count.

In this case involving a large number of counts, it is unrealistic to assume that the sentence would have been less if the nine counts which we have placed to one side had been ignored by the trial judge. It is true, as mentioned by the dissent below (R. 139), that the sentencing judge noted that there were fifteen counts before him. But the trial judge placed much more emphasis upon the quantities of narcotics involved in the admittedly valid counts, for at the time of sentencing he said (R. 125):

> This is a narcotic offense of an exceedingly aggravated character, because apparently this defendant has been dealing in narcotics, in large quantities for a considerable period of time. Some of the counts involve quantities as large as 40 capsules. * * *

These remarks could relate only to the transactions occurring on January 21 and 29, 1955, counts 4–6 and 10–12; these offenses must have been foremost in the judge's mind. Then, too, the sentence itself suggests that the trial judge would not have selected a lesser term if faced with six instead of fifteen counts. A maximum sentence of thirty years could have been assessed on the six counts considered here, *Gore* v. *United States, supra,* and the adjudged term of five-to-fifteen years was well within permissible limits. Under these circumstances, review of the additional counts would appear to have been an academic discussion of no real benefit to petitioner.[11]

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[11] Petitioner urges (Pet. Br. 43) that all counts should be reviewed because exposure of errors in counts not directly affecting the length of sentence "might materially affect a defendant's parole chances, his standing in society, and even his punishment in the event he is subsequently convicted again and sentenced as a repeating offender." Petitioner is mistaken.

As to parole, eligibility depends upon service of "one-third of the total of the term or terms for which he [the defendant] was sentenced * * *." 28 C. F. R. 2.1. The number of counts upon which concurrent sentences were imposed is therefore immaterial. See 18 U. S. C. 4202; *United States* v. *Howell*, 103 F. Supp. 714, 717 (S. D. W. Va.), affirmed, *Howell* v. *United States*, 199 F. 2d 366 (C. A. 4); *Williamson* v. *Hardwick*, 135 F. Supp. 463, 464 (N. D. Ga.). Nor is the decision of the Board of Parole as to whether an eligible prisoner should be released on parole dependent upon the number of counts. The test is whether "there is a reasonable probability that such prisoner will

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society * * *." 18 U. S. C. 4203.

Finally, sentencing as a second offender would be affected only if a defendant were convicted of narcotics violations and other crimes included in the same indictment (but cf. Rule 8, F. R. Crim. P., dealing with joinder of offenses) and the court refused to review the narcotics counts because the other counts were valid. See 26 U. S. C. (Supp. V) 7237 (c), regarding penalties for subsequent violations of the narcotics statutes. Such is not this case.

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